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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD STEVEN DANIEL, JR.,

Defendant and Appellant.

A152206

(San Mateo County
Super. Ct. Nos. SC082865,
SC083631)

While in custody in a San Mateo County jail, defendant Richard Steven Daniel, Jr., attacked another inmate, and a peace officer was injured while trying to stop the attack. Defendant was convicted of actively participating in a criminal street gang (among other offenses), and the jury found true the enhancement allegation that he personally inflicted great bodily injury on the officer in the commission of the offense. Defendant contends the evidence was insufficient to support the finding he personally inflicted great bodily injury on the peace officer. He also argues remand is required to allow the trial court to exercise its sentencing discretion under Senate Bill 1393 (2017–2018 Reg. Sess.) (S.B. 1393).

We reject defendant’s first contention, but we will remand for resentencing under S.B. 1393.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 30, 2013, San Mateo County Deputy Stacey Moody was on duty at the Maguire Correctional Facility. She was assigned to “four east” along with another correctional officer and a trainee. Four east is a two-tiered general housing unit

or “pod” that can house up to 94 inmates. It has rooms on three of four sides, designated A, B, and C “wall.”

Around 8:45 p.m., the inmates housed in A wall, about 25 to 30 inmates, were out of their rooms for recreation time. Inmate Jose Ramos asked if he could get a haircut, and inmate Agustin Cuevas was allowed to leave his room in B wall to cut Ramos’s hair. While Cuevas was cutting Ramos’s hair, there was a report over the radio of a fight in another housing unit. The two officers working with Moody went to help with that disturbance.

Moody was then the only officer in four east. The protocol when a housing unit is understaffed is to lock down the unit. So Moody told Cuevas the haircut was over and yelled that all inmates were “to lock it down.” Immediately after Moody announced that recreation time was over, defendant and another inmate ran to Cuevas and grabbed him. Ramos was knocked backwards, and he ran away. Defendant and the other inmate, Andres Zamora, threw Cuevas to the ground and began punching Cuevas such that “his head was bouncing off the cement floor.” Cuevas tried to cover his head and never threw any punches.

Moody took out her handcuffs and ordered defendant and Zamora to stop fighting and lie on the ground, but they did not comply. Moody was closer to defendant, and she put her arms around his back and tried to pull him away from Cuevas as she continued to instruct the inmates to stop fighting. According to Moody, when she made physical contact with defendant, he had no reaction. Moody testified, “It was like I wasn’t there.” She continuing trying to pull defendant away from Cuevas, and every time defendant punched Cuevas, Moody punched him. She punched defendant at least five times, hitting his back and face.

At one point, Cuevas was able to “slither away” from Zamora and defendant, and he got up and ran toward a staircase. Zamora caught up with Cuevas, and defendant followed with Moody “hanging onto his shoulders.” Zamora and defendant got Cuevas on a couch and hit him in the face and upper torso. Moody was dragged along with defendant for about a second when he moved from the site of the initial attack to the

couch. Moody testified, “I had him by the shoulders. I was trying to put him in a bear hug. There was pulling. There was a lot of pulling. I was pulling one way and he was trying to get to the fight . . .” Asked whether defendant pushed back at her, Moody responded, “It was like I wasn’t there. I was not a concern to him. He was going to get where he needed to go and he was just going to move forward and it was like I wasn’t there.” “He was . . . trying to pull away from me, but he wasn’t ever swinging at me. He was pulling . . . to get over to where Zamora was. And he got over there, not as quick as Zamora, but he got there.”

Defendant was positioned “down on his knee right at the couch and [Moody] was over the top of [him].” At one point, Moody was “forehead to forehead” with Zamora, and she pushed him away. Zamora came back toward Moody, and she punched Zamora once in the face. She was holding her handcuffs with the hand she used to hit Zamora, and he grabbed the end of one handcuff. Moody immediately told him not to touch her handcuffs, and Zamora let go and went back to hitting Cuevas.

During the attack on Cuevas, Moody radioed that there was a fight, and jail staff eventually arrived to assist her. Moody estimated the entire fight lasted about a minute and a half. After other officers arrived at four east, defendant and Zamora were handcuffed, an officer directed all inmates to their rooms, and the housing unit was locked down.

Moody did not notice any discomfort during the struggle with defendant, but she was sent to the hospital and noticed she was sore; the next day, she felt pain in her shoulder, arm, and hand. As a result of injuries she sustained on July 30, 2013, Moody had nine physical therapy appointments, surgery on her shoulder, and 32 post-surgery physical therapy appointments.

Defendant was charged with four felony counts: assault on Cuevas by means of force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(4); count 1), battery with injury on a peace officer (§ 243, subd. (c)(2); count 2), resisting a peace

¹ Further undesignated statutory references are to the Penal Code.

officer resulting in serious bodily injury (§ 148.10, subd. (a); count 3), and street terrorism (actively participating in a criminal street gang) (§ 186.22, subd. (a); count 4). For counts 1, 2, and 3, it was alleged defendant committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)), and for counts 2 and 4, it was alleged defendant personally inflicted great bodily injury upon Moody in the commission of the offense (§ 12022.7, subd. (a)). It was further alleged that defendant had suffered two prior serious felony convictions (§ 667, subd. (a)(1)), which also qualified as “strikes” under the “Three Strikes” law (§§ 667, subd. (b)–(j), 1170.12), and for which he served prison terms (§ 667.5, subd. (b)).

A jury trial began on March 21, 2017. After deliberating for about four days, the jury reached a verdict on April 10. It found defendant guilty of count 1 (assault of Cuevas) and found true the allegation that he committed the offense for the benefit of a criminal street gang. It found him not guilty of count 2 (battery with injury to a peace officer) and not guilty of the lesser included offense of battery on a peace officer.² It found him not guilty of count 3 (resisting a peace officer causing serious bodily injury) and guilty of the lesser included offense of resisting arrest in violation of section 148, subdivision (a)(1). The jury found defendant guilty of count 4 (actively participating in a criminal street gang) and found true the allegation that he personally inflicted great bodily injury on Moody in the commission of the crime.³ In a bifurcated proceeding, the trial court found true the allegations of two prior serious felony convictions, two prior “strikes,” and two prior prison terms.

² The jury could not reach a verdict on the lesser included offense of assault against a peace officer (§ 241, subd. (c)), the trial court declared a mistrial on the misdemeanor charge, and the charge was later dismissed on a motion by the prosecution.

³ Because the gang allegations are not challenged on appeal, we have not described the evidence supporting this offense and the gang enhancement. Suffice it to say evidence was presented that defendant, Zamora, and Cuevas were all gang members and the attack on Cuevas was gang related. Also, we have not described Moody’s doctors’ testimony about the extent of her injuries because defendant does not dispute there was sufficient evidence to support a finding Moody suffered great bodily injury during the attack on Cuevas.

Defendant made a motion to reduce counts 1 and 4 to misdemeanors, which the trial court denied. Defendant also argued the enhancement for great bodily injury should be dismissed for lack of sufficient evidence, and the court rejected this argument. However, the court did grant defendant's *Romero*⁴ motion to strike one of the two prior "strike" convictions.

Defendant was sentenced to 19 years in prison, consisting of nine years for count 1 (the middle term of three years doubled to six years because of one prior "strike," plus three years for the gang enhancement), plus 10 years for his two prior serious felony convictions pursuant to section 667, subdivision (a) (one five-year term for each prior serious felony conviction). For count 4, active gang participation, the trial court imposed a seven-year term (the middle term of two years doubled, plus three years for the enhancement for great bodily injury), which it stayed pursuant to section 654. For count 3, misdemeanor resisting arrest, the court sentenced defendant to a year in county jail to be served consecutively to the prison sentence.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends the evidence was insufficient to support the finding he personally inflicted great bodily injury on Moody in the commission of count 4, actively participating in a street gang. He acknowledges there was evidence that Moody suffered great bodily injuries caused by the July 30 incident,⁵ but he argues there was no evidence showing "he personally applied or used any force which contributed to the great bodily injury." Instead, defendant asserts, Moody's "injuries appear to have been caused either by Zamora's act of yanking the handcuffs away . . . and/or Moody's own actions, rather

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.

⁵ For example, defendant cites to treating doctor Chris Mochizuki's testimony that "the part where [Moody's] reaching over shoulder level, . . . bear-hugging the person, could be very consistent with [Moody's shoulder injury]" and that the injury to her wrist could have been caused by either the bear-hug action or the grabbing and pulling on the handcuff.

than being directly inflicted by [him].” We conclude, however, there was sufficient evidence for the jury to find defendant directly caused Moody’s injuries when he struggled with her and resisted her efforts to stop him from attacking another inmate. Thus, there was sufficient evidence to support the finding that defendant personally inflicted great bodily injury in the commission of count 4.⁶

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

Section 12022.7, subdivision (a) provides, “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.”

Our Supreme Court has explained “the meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning.” (*People v. Cross* (2008) 45 Cal.4th 58, 68 (*Cross*).) “Commonly understood, the phrase ‘personally inflicts’ means that someone ‘in person’ (Webster’s 7th New Collegiate Dict.

⁶ While defendant suggests some of Moody’s injuries could have been caused by Zamora pulling on the handcuff, he also acknowledges there was evidence the injuries occurred when Moody was hanging on to, and bear-hugging, defendant. To the extent defendant may be arguing there was insufficient evidence that Moody’s injuries were caused by the struggle between Moody and defendant, we reject the argument. Dr. Mochizuki’s testimony provided sufficient evidence that the struggle with defendant caused Moody’s injuries. (See fn. 5, *ante*.)

(1970) p. 630), that is, directly and not through an intermediary, ‘cause[s] something (damaging or painful) to be endured.’ (*Id.* at p. 433.)” (*Ibid.*; see *People v. Cole* (1982) 31 Cal.3d 568, 579 [“in enacting section 12022.7, the Legislature intended the designation ‘personally’ to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim”].)

For his claim of insufficiency of the evidence, defendant relies on *People v. Rodriguez* (1999) 69 Cal.App.4th 341 (*Rodriguez*). In that case, a jury found that defendant Rodriguez’s prior conviction (for resisting arrest with serious bodily harm) was a second “strike” for purposes of the “Three Strikes” law, and the issue on appeal was whether the trial court had properly instructed the jury on personal infliction of great bodily injury. (*Id.* at pp. 345–346.) Evidence regarding the prior conviction showed Rodriguez was in custody when he escaped “and began running away, instigating a chase by Officer Martin. At one point during Martin’s pursuit of Rodriguez, a bystander handed Rodriguez a bicycle to aid in his escape. Martin tackled Rodriguez on the bicycle and both men fell to the ground. Martin testified that during the tackle he hit his head, either on the ground, the concrete sidewalk, or the lamppost, and was knocked unconscious.” (*Id.* at p. 346.) As a result of this incident, Rodriguez was convicted of resisting an officer resulting in bodily injury in violation of section 148.10.

The question for the jury was whether Rodriguez had personally inflicted great bodily injury on a person other than an accomplice during the prior offense, which would mean his prior conviction qualified as a “strike” under the Three Strikes law. (*Rodriguez, supra*, 69 Cal.App.4th at pp. 345–346.)⁷ The jury was instructed that a finding of personal infliction of great bodily injury required “ ‘an unlawful act which was a cause of

⁷ Section 1192.7, subdivision (c)(8), defines a “serious felony” to include “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm.” Such a “serious felony,” in turn, qualifies as a “strike” under the Three Strikes law. (§ 1170.12, subd. (b)(1); see *People v. Kelii* (1999) 21 Cal.4th 452, 456 [“The Three Strikes law defines a strike as, among other things, ‘any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.’ ”].)

[great bodily] injury’ ” and that “ ‘[a] cause of injury is an act that sets in motion a chain of events that proceed a direct, natural and possible consequence of the act, the injury, and without which the injury would not occur.’ ” (*Id.* at pp. 346–347.) Rodriguez argued the instruction “improperly equated ‘personally inflict’ with ‘proximate cause’ because it used the standard definition of proximate cause to define causation in this context.” (*Id.* at p. 347.) A panel of this court agreed with Rodriguez, explaining, “The instruction was wrong because it allowed the jury to find against Rodriguez if the officer’s injury was a ‘direct, natural and probable consequence’ of Rodriguez’s action, even if Rodriguez did not personally inflict the injury.” (*Id.* at pp. 347–348.) The court went further, concluding, “According to the record, Rodriguez did not push, struggle or initiate any contact with the officer during the 1992 incident. Instead, the evidence shows that Rodriguez was trying to escape arrest on a bicycle and the officer injured himself when he tackled Rodriguez. Not only is it reasonably probable that a properly instructed jury would not have found Rodriguez personally inflicted the injury, there is in fact no evidentiary basis in this record for a jury to find he personally inflicted that injury.” (*Id.* at p. 352.)

Rodriguez is distinguishable from the current case because Rodriguez did not push or struggle with the officer, and the officer injured himself immediately upon tackling the defendant. Here, in contrast, a reasonable jury could determine Moody did not merely injure herself, but rather defendant was a direct cause of her injuries because the injuries resulted from an ongoing struggle between defendant and Moody.

A more instructive case in our view is *People v. Elder* (2014) 227 Cal.App.4th 411 (*Elder*), cited by the Attorney General. In *Elder*, defendant Elder entered a van, which the victims, a married couple, had left unlocked in a parking lot. The victims returned to the van and, unaware of Elder’s presence, started driving home. Elder emerged from the back of the van brandishing a BB gun and demanded the victims drive him to West Sacramento. The husband, who was driving, complied. The husband turned to look at Elder a few times, and each time Elder hit him with the butt of his gun. Elder also demanded the husband’s wallet and the wife’s cash. In traffic, the husband stopped the

van, and the wife was able to jump out. Elder tried to grab her, but she escaped without injury. The husband then accelerated abruptly and slammed on the breaks, throwing Elder back and forward inside the van. When Elder flew forward, the husband hit him in the face. (*Id.* at pp. 414–415.) Elder “tried to exit the van through the sliding passenger door, but was unable to exit because the door was stuck. [The husband] grabbed [Elder]’s hooded sweatshirt. At this point, [Elder] was facing the front passenger seat, and his right arm and leg extended out of the van door. While [Elder] was partly out of the door, [the husband] accelerated and then hit the brakes again, which caused the sliding door to slam into [Elder]’s body. [The husband] testified that as [Elder] was struggling to get out of the hoodie and get out of the van, [the husband]’s right ring finger ‘got pulled in the hoodie’ and the finger ‘snapped,’ ” resulting in a dislocated finger. (*Id.* at p. 415 and fn. 3.)

A jury found Elder guilty of kidnapping and robbery of both victims and assault with a deadly weapon on the husband. For each count involving the husband, the jury further found true the allegation that Elder personally inflicted great bodily injury. (*Elder, supra*, 227 Cal.App.4th at pp. 414, 416.) On appeal, Elder argued “there was no substantial evidence that he directly performed the act that caused injury to the victim’s finger,” but the Court of Appeal disagreed. (*Id.* at p. 417.)

The *Elder* court began its analysis with the well-established rule that a finding of personal infliction of great bodily injury requires that the defendant is the *direct*, not just the proximate, cause of the victim’s injuries. (*Elder, supra*, 227 Cal.App.4th at p. 418.) But, the court observed, case law established that “neither the application of physical force, nor affirmative action by the defendant is necessarily required to support a section 12022.7 GBI enhancement.” (*Id.* at p. 419.)⁸

⁸ The court based its observation on two cases, *Cross, supra*, 45 Cal.4th 58, and *People v. Warwick* (2010) 182 Cal.App.4th 788. (*Elder, supra*, 227 Cal.App.4th at p. 419.) In *Cross*, our high court held that a pregnancy resulting from nonforcible sexual conduct with a minor may support a finding of great bodily injury. (*Cross, supra*, at pp. 61, 65-66.) The court rejected the view that “great bodily injury invariably requires the application of physical force to the victim in order to cause great bodily injury.” (*Id.* at p.

The *Elder* court reasoned, “the fact that the victim here grabbed defendant as he struggled to get away . . . does not absolve defendant from responsibility for the injury he caused by struggling and pulling away.” (*Elder, supra*, 227 Cal.App.4th at p. 420.) The court distinguished *Rodriguez* as follows: “Here, unlike *Rodriguez*, [Elder] engaged in a physical struggle with the victim. It was during the volitional act of struggling and attempting to pull away that the victim’s injury was inflicted. [Elder] was a direct cause of the injury. Unlike in *Rodriguez*, the victim did not injure himself. Neither the accidental nature of the injury, nor the fact that it takes two to struggle, absolves defendant of responsibility for personally inflicting [great bodily injury] on the victim. (*Id.* at p. 421.)

We conclude the present case is more like *Elder* than *Rodriguez*. Here, defendant engaged in a physical struggle with Moody, and “[i]t was during the volitional act of struggling and attempting to pull away that the victim’s injury was inflicted.” (*Elder, supra*, 227 Cal.App.4th at p. 421.) Defendant relies heavily on Moody’s testimony that he did not react to her commands or physical intervention and “It was like I wasn’t there.” But Moody also testified that, when defendant moved from the site of the initial attack to the couch, “[h]e was . . . trying to pull away from me He was pulling . . . to get over to where Zamora was.” And, while Cuevas and Zamora were able to run from

66, fn. 3.) In *Warwick*, the defendant was convicted of child abuse or neglect and the jury found true the enhancement allegation of great bodily injury; the defendant had hidden her pregnancy from her family, given birth at home, and then failed to swaddle the baby or otherwise seek care for him. When the baby was discovered, he was suffering from hypothermia, resulting in brain damage. (*Warwick, supra*, at pp. 790–792.) In affirming the enhancement for great bodily injury, the Court of Appeal rejected the defendant’s argument that “affirmative action” is required to personally inflict great bodily harm. The court explained, “[T]he court [in *Cross*] stated that ‘personally inflicts’ means that the defendant directly, rather than through an intermediary, ‘ “cause[s] something (damaging or painful) to be endured” [citation].’ [Citation.] [¶] In our view, this definition does not preclude the failure to act where action is required, and in this case, action was most certainly required. But even if we accepted defendant’s view, she did take ‘affirmative action,’ albeit actions that were direct and ineffectual—defendant’s actions after her child’s birth directly caused his injuries, including only partially covering him with a blanket rather than properly swaddling him.” (*Id.* at p. 795.)

the site of the initial attack to the couch, with Moody hanging on to defendant, “It was more of a scuffle. He was on the ground [where] the hair cutting was going on. When Cuevas was able to get away and run towards the couches, it was more of a, kind of quick, crawling. And I was pulling on to hold him back. The only person I saw run when they left the haircutting place was Cuevas and Zamora.” Based on Moody’s testimony of a “scuffle” with defendant “crawling” and “trying to pull away from” Moody as she hung on his shoulders, the jury reasonably could have found there was a struggle between defendant and Moody and it was the struggle (not Moody’s acts alone) that caused Moody’s injuries. Accordingly, we reject defendant’s claim the evidence was insufficient to support the jury’s finding that he personally inflicted great bodily injury on Moody in the commission of count 4.⁹

B. *S.B. 1393*

Defendant was sentenced to two consecutive five-year terms under section 667, subdivision (a), one for each of his prior serious felony convictions. At the time of his sentencing in 2017, the trial court was required to impose those terms under section 667, subdivision (a). On September 30, 2018, while this appeal was pending, the Governor signed S.B. 1393, which amends sections 667, subdivision (a), and 1385 to provide the trial court with discretion to strike enhancements for serious felony convictions. The legislative changes went into effect on January 1, 2019.

In supplemental briefing, defendant asserts remand is required to allow the trial court to exercise its sentencing discretion under S.B. 1393. The Attorney General agrees S.B. 1393 applies to defendants whose judgments are not final on the law’s operative

⁹ Defendant also asserts it makes little sense that the jury found him not guilty of counts 2 and 3 (battery with injury of a peace officer and resisting arrest with serious bodily injury) but found he personally inflicted great bodily injury on Moody. Yet, he acknowledges a jury may return inconsistent verdicts. Indeed, our high court has observed, “It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand.” (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) Thus, even if we assume the jury’s verdicts are inconsistent “that conclusion does not, of itself, warrant reversal.” (*Ibid.*)

date. We agree with the parties and will remand to allow the trial court to exercise its discretion under S.B. 1393. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 974 [remanding to trial court with directions to resentence the defendant after January 1, 2019, pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393].)

DISPOSITION

The matter is remanded for resentencing pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393, effective January 1, 2019. In all other respects, the judgment is affirmed.

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A152206, *People v. Daniel*